

TREASURE ISLAND RESORTS SDN. BHD.

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v.

UNITED MALAYAN BANKING CORPORATION BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SHAIK DAUD J.
[ORIGINATING SUMMONS NO. D1-24-248-91]
21 FEBRUARY 1994

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PRACTICE & PROCEDURE: Plaintiff seeking declaration that it was not a party to an earlier suit - Plaintiff claiming that it never authorised solicitors to institute earlier suit - Whether earlier suit and orders made thereunder are a nullity.

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The writ in Suit No. D1-22-165-88 (the earlier suit) described the first plaintiff as Treasure Island Sdn. Bhd. The plaintiff therein obtained an interim injunction against the defendants therein. In the draft order prepared by the plaintiff's solicitors, the first plaintiff was described as Treasure Island Resorts Sdn. Bhd., the plaintiff herein. The defendants in the earlier suit, including the defendant herein, applied to set aside the injunction which application was allowed. All papers were served on the plaintiff herein who accepted service thereof.

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The plaintiff now applies for a declaration that it was not a party to the earlier suit and that the earlier suit and the orders made thereunder are a nullity.

Held:

[1] It was clear that the plaintiff herein was at all times aware of Suit No. D1-22-165-88 and that it was in fact the plaintiff in that suit. This is confirmed by the search done at the Registrar of Companies, which showed that Treasure Island Sdn. Bhd. never existed whereas the plaintiff herein was registered, and by the documents produced by the defendant herein.

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[2] Even if it was a mistake as alleged, the plaintiff took no immediate steps to remedy it. On discovering the alleged mistake, the plaintiff herein should have applied for their name to be struck off the writ but instead it allowed proceedings to proceed and accepted cause papers in its name.

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[3] It was clear from the chronology of events that it was the plaintiff which changed the name stated in the writ in the earlier suit to Treasure Island Resorts Sdn. Bhd. in the order. Although the plaintiff says that the solicitors had no authority to institute the earlier suit, they have not taken any steps to make a substantive application to either stay the proceedings for want of authority or to have it struck out. In fact they took no steps to rectify what they now call an unauthorised amendment and even confirmed the draft order which set aside the *ex parte* injunction and which bore their name.

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[4] There was sufficient evidence to show that the plaintiff herein was the correct party to be named as the first plaintiff in D1-22-165-88 and it is a bit late in the day for the plaintiff to apply for the declaration they seek.

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[Plaintiff's originating motion for declaration dismissed with costs].

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a [Ed. Note : In the light of this decision the Court also dismissed the plaintiff's appeals against the decision of the SAR in:

- (i) granting leave to the defendant to amend the writ in D1-22-165-88; and
- (ii) refusing the plaintiff's application to stay proceedings therein;

b without hearing those appeals on their merits].

Cases referred to:

William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor. [1991] 2 CLJ 1309/
[1991] 1 SCR 513 (**foli**)

Richmond v. Branson [1914] 1 Ch. 968 (**refd**)

c For the plaintiff - *Ramdass Tikamdas; M/s. Siva, Ram & Associates*
For the defendant - *Hira Singh; M/s. Asbir Hira Singh & Co.*

JUDGMENT

Shaik Daud J:

This is an application by the plaintiff by originating summons for a declaration:

- d** (a) that the plaintiff Treasure Island Resorts Sdn. Bhd. is and was at all material times not a party to the suit intituled Kuala Lumpur High Court Suit No. D1-22-165-88;
- (b) further and in the alternative, a declaration that so far as the plaintiff herein is concerned the Suit D1-22-165-88 is a nullity;
- e** (c) further and consequently, a declaration that so far as the plaintiff is concerned the orders dated 16 August 1988 and 29 February 1989 in the Suit D1-22-165-88 are a nullity;
- and consequential reliefs.

f The main issue raised is that Treasure Island Resorts Sdn. Bhd. (the plaintiff herein) was never a party to the suit intituled D1-22-165-88. The plaintiff herein never authorised solicitors in that suit to file the suit and therefore the suit intituled D1-22-165-88 is a nullity. The plaintiff herein was never cited as a party to that writ.

g First and foremost I need to trace through several files to discover how the name Treasure Island Resorts Sdn. Bhd. came to be in the writ D1-22-165-88. In that suit filed on 10 August 1988 the first plaintiff is Treasure Island Sdn. Bhd. with three other plaintiffs and the defendants are Coopers and Lybrand (as Receivers and Managers of the third defendants); United Malayan Banking Corporation as the second defendant and Cocoa Processors Sdn. Bhd. as the third defendant. The writ was filed by Messrs. V. Nadarajan & Company a firm of solicitors from Kuala Lumpur. In that suit the plaintiffs therein *inter alia* seek a permanent injunction and specific performance.

h Then by an *ex parte* summons in chambers filed on 10 August 1988 the plaintiffs in D1-22-165-88 applied for an interim injunction *inter alia* restraining the defendants from parting with the assets of the third defendants therein. In that summons in chambers Treasure Island Sdn. Bhd. was named as the first plaintiff. On 16 August 1988 the *ex parte* interim injunction was allowed by the Court and the plaintiffs therein filed a draft order in Court. This is I think where the trouble started. In the draft order submitted by the plaintiffs the first plaintiff is called Treasure Island **Resorts** Sdn. Bhd. The word

i "Resorts" appeared in the draft order. Whether this was deliberate or not is not clear. Based on that draft order the Court issued an order with first plaintiff as Treasure Island

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Resorts Sdn. Bhd. This order bearing the name Treasure Island Resorts Sdn. Bhd. was thereupon served on the present defendant i.e. United Malayan Banking Corporation. The same order was also served on the second and third defendants in D1-22-165-88.

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Thereupon all three defendants in D1-22-165-88 filed notices of motion on 18 November 1988 praying for the *ex parte* interim injunction granted on 16 August 1988 be dissolved and also prayed for damages. All the three applications to set aside the interim injunction bore the name Treasure Island Resorts Sdn. Bhd. and were served on the plaintiffs in D1-22-165-88. All three applications were heard on 23 March 1989 and the Court dissolved the *ex parte* injunction and ordered damages to be assessed. At that hearing no one objected to the first plaintiff being named Treasure Island Resorts Sdn. Bhd. and in fact from the records I can see that it never was raised. Thereafter the draft order was filed again with the first plaintiff as Treasure Island Resorts Sdn. Bhd. and was approved by the solicitors for the plaintiffs therein. The order extracted and served on the plaintiffs therein bore the name Treasure Island Resorts Sdn. Bhd. From this chronology of events it seems clear to me that the mistake, if it is a mistake, was by the plaintiffs solicitors themselves.

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It is the submission of learned Counsel for the defendants that this is not a mistake because on the documents available and filed in D1-22-165-88 it is undoubtedly clear that Treasure Island Resorts Sdn. Bhd. was at all times a party to that suit, because the negotiations for the sale of the assets of Cocoa Processors Sdn. Bhd. were between Treasure Island Resorts Sdn. Bhd. and United Malayan Banking Corporation. This is clearly evidenced by document. In the affidavit in support of their *ex parte* application for the interim injunction affirmed on 10 August 1988 the plaintiffs exhibited two letters one dated 4 September 1986 from Treasure Island Resorts Sdn. Bhd. to Coopers and Lybrand Associates Sdn. Bhd. and the other dated 27 May 1988. From these two letters alone it can be seen that as far back as 1986 the plaintiffs Treasure Island Resorts Sdn. Bhd. were in the picture. Therefore it is apparent that there is no mistaken as to the identity as to who was the first plaintiff in D1-22-165-88. Subsequent letters between the defendants and the plaintiffs herein were all copied to all the directors of Treasure Island Resorts Sdn. Bhd. Furthermore a search by the defendants from the Registrar of Companies revealed that no such company is registered by the name of Treasure Island Sdn. Bhd. whereas Treasure Island Resorts Sdn. Bhd. exists.

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From all the above it seems clear to me that plaintiff herein at all times were aware of suit D1-22-165-88 and they were in fact the plaintiffs in that suit. In fact as confirmed by the Registrar of Companies Treasure Islands Sdn. Bhd. never existed. If it was a mistake the plaintiffs herein took no immediate steps to remedy it. On discovering the mistake the plaintiffs herein should have applied for their name to be struck out of the writ but instead they allowed proceedings to proceed and accepted cause papers in their name.

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The plaintiff's now claim that they gave no authority to file D1-22-165-88 and as such that suit is a nullity. It seems strange that the plaintiff herein is claiming want of authority when such claim ought rightly to be made by the defendants. From the affidavit evidence it seems clear to me that plaintiffs herein gave authority to Jasbir Singh Chall, the second defendant in D1-22-165-88, to act on behalf of Treasure Island Resorts Sdn. Bhd. and he in turn appointed Messrs. V. Nadarajan a firm of solicitors to file D1-22-165-88. What is more relevant is that Jasbir Singh Chall represented to the defendants herein that he had the authority. If the plaintiffs herein now say that Jasbir Singh Chall had no authority to act for Treasure Island Resorts Sdn. Bhd. then it is

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- a** obvious that the matter is between the plaintiffs herein and Jasbir Singh Chall. From the chronology of events set up above it is not the defendant herein who changed the name from Treasure Island Sdn. Bhd., to Treasure Island Resorts Sdn. Bhd., it was in fact the plaintiffs themselves. The defendants herein had in fact obtained an order dated 25 November 1992 to have the name Treasure Island Sdn. Bhd. be substituted by Treasure Island Resorts Sdn. Bhd. in D1-22-165-88. If the plaintiff is now saying that
- b** Messrs. V. Nadarajan had no authority to institute suit D1-22-165-88 then they have not taken any steps to make a substantive application to either stay the proceedings for want of authority or to have it struck out. In fact they took no steps to rectify what they now call an unauthorised amendment. They even confirmed the draft order which set aside the *ex parte* injunction and which bore their name. In *William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor.* [1991] 1 SCR 513 the appellant company had
- c** instituted an action by writ through their solicitors, Messrs. Paul Chong & Kraal against the respondent, *inter alia* for breach of contract of service and fiduciary duties. The substantial relief claimed was to restrain the respondent from exploiting certain confidential information of the appellants relating to its customers. The appellants obtained an interlocutory injunction. At the hearing of the respondent's application to set aside the injunction, the respondent orally challenged the authority of Paul Chong & Kraal to act for the appellant. The High Court upheld the challenge and struck off the
- d** appellant's action. On appeal, however, the Supreme Court reversed the finding and held that in the absence of sufficient or admitted evidence that the action before the Court was not proper a Court could only consider the issue of want of authority of solicitors on an application by motion or summons. The Supreme Court followed *Richmond v. Branson* [1914] 1 Ch. 968. The Supreme Court held at 588:
- e** ... the challenge to the authority of the appellant's solicitors to act, we agreed with the observations of Warrington J. in *Richmond v. Branson & Sons*, above, that the business of the Courts could not be carried out if one were not entitled to assume the authority of the solicitor unless and until that authority has been disputed and shown not to exist in a proper form of proceedings, namely a substantive application on the part of the parties concerned to stay proceedings on the grounds of want of authority.
- f** Therefore it is my view that the plaintiffs herein ought to have challenged the want of authority earlier in a substantive application. On the evidence before me I am satisfied that Treasure Island Resort Sdn. Bhd. was the correct party to be named as first plaintiff in D1-22-165-88. I feel that it is a bit late in the day for the plaintiff to apply for the declaration they seek. Therefore the plaintiff's originating motion for a declaration is dismissed with costs. In the light of this decision plaintiff's appeal in D1-22-165-88
- g** against the learned Senior Assistant Registrar's decision to amend that writ to substitute Treasure Island Resort Sdn. Bhd. for Treasure Island Sdn. Bhd. is accordingly decided in favour of the defendant and I therefore dismissed that appeal also with costs. Similarly the plaintiff's appeal in D1-22-165-88 (enclosure 91) against the learned Senior Assistant Registrar's refusal to stay all proceedings therein is decided and I therefore also dismiss that appeal with costs. As such I feel it unnecessary to give
- h** separate grounds of judgment for the two other appeals mentioned above as the decision in this application, to my mind, simultaneously decided the issues in those two matters and the grounds would substantially be the same. In the light of this decision those two appeals were not heard on merits.
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